Office-Supreme Court, U.
FILED
JUN 2 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 92

GEORGE B. THORP,

Petitioner,

vs.

THE BOARD OF TRUSTEES OF SCHOOLS FOR INDUSTRIAL EDUCATION—NEWARK COLLEGE OF ENGINEERING

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF

SAMUEL L. ROTHBARD,
Counsel for Petitioner,
1060 Broad Street,
Newark 2, New Jersey.

EMIL OXFELD,
of the New Jersey Bar,
On the Brief.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
A. Summary Statement of the Matter Involved	1
B. Jurisdiction	3
C. The Question Presented	5
D. The Reasons Relied on for the Allowance of the Writ	6
Conclusion	6
Brief in Support of Petition for Writ of Certiorari	8
I. The Opinion of the Court Below	8
II. Jurisdiction	8
III. Statement of the Case	9
IV. Specification of Errors to be Urged	11
V. Argument	11
Chapter 23 of the New Jersey Laws of 1949 is unconstitutional because in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution	11
Conclusion	25
Appendix of Statutes	27

Table of Cases Cited

American Communications Association v. *Douds*, 339 U. S. 382	21
Bridges v. *Wixon*, 326 U. S. 136	20
Cummings v. *Missouri*, 4 Wall. 277	23
DeJonge v. *Oregon*, 299 U. S. 353	20
Gitlow v. *New York*, 268 U. S. 652	18
Herndon v. *Lowry*, 301 U. S. 242	18
Lanzetta v. *New Jersey*, 306 U. S. 451	18
Imbrie v. *Marsh*, 5 N. J. Super. 239, 68 A. 2d 761 (affirmed 3 N. J. 578, 71 A. 2d 352)	24
McAuliffe v. *Mayor*, 155 Mass. 216	11

	Page
Murdock v. *Penn*, 319 U. S. 105	13
Schneider v. *State*, 308 U. S. 147	13
Schneiderman v. *United States*, 320 U. S. 118	20
State v. *Klapprott*, 127 N. J. L. 395	18
Taylor v. *Mississippi*, 319 U. S. 583	19
Thomas v. *Collins*, 323 U. S. 516	13
Thornhill v. *Alabama*, 310 U. S. 88	13
United States v. *L. Cohen Grocery Co.*, 255 U. S. 81	18
United States v. *Lovett*, 328 U. S. 303	23
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624	12
Whitney v. *California*, 274 U. S. 357	18

TABLE OF STATUTES CITED

Fifth Amendment of the United States Constitution	11
First Amendment of the United States Constitution	11
Fourteenth Amendment of the United States Constitution	11
28 U.S.C., sec. 1257	8
Section 1257 of the Judiciary Act of June 25, 1948, c. 646, 62 Stat. 929	3, 8
New Jersey Laws of 1949, Chapter 22, page 68	3, 8
New Jersey Laws of 1949, Chapter 23, page 70	3, 8
Revised Statutes of New Jersey, sec. 18:13-9.1	3
Revised Statutes of New Jersey, sec. 18:13-9.2	3
Revised Statutes of New Jersey, sec. 41:1-3	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 92

GEORGE B. THORP,

Petitioner,

vs.

THE BOARD OF TRUSTEES OF SCHOOLS FOR INDUSTRIAL EDUCATION—NEWARK COLLEGE OF ENGINEERING

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The Petition of George B. Thorp respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioner, George B. Thorp, a duly qualified teacher, specializing in the fields of mechanical and aeronautical engineering, of many years experience, entered into a contract of employment with the Board of Trustees of the School for Industrial Education, as a Special Lecturer in mechanical engineering at the Newark College of Engi-

neering (R. 3), a school supported in whole or in part by public funds (R. 6). After entering upon the duties of such employment, he was notified he would have to sign the oath of allegiance and office, hereinafter set forth, and, upon his refusal to do so because of conscientious and constitutional objections, the contract of employment was breached by the college, and petitioner's employment as a teacher was terminated (R. 3, 8, 10, 17). Petitioner filed an appeal with the Commissioner of Education of the State of New Jersey (R. 3) and that official refused to restore petitioner to his teaching position and refused to rule upon the constitutionality of the statute, claiming that he had no authority to do so (R. 12). From that decision, petitioner appealed to the New Jersey State Board of Education (R. 13), and that Board likewise refused to restore petitioner to his teaching position, and likewise ruled that it had no authority to pass upon the constitutionality of the statute involved (R. 13).

Petitioner appealed (in lieu of certiorari) to the Appellate Division of the Superior Court of New Jersey (R. 2); that appeal was removed by certification to the Supreme Court of New Jersey, upon the latter's own motion (R. 1). After oral argument, the Supreme Court of New Jersey sustained the validity of the statute, overruled all the objections raised by petitioner, affirmed the decision of the New Jersey State Board of Education and refused to grant petitioner the relief he sought (R. 15). The effect of the decision is not merely to affirm the action of the college in breaching the then existing contract of employment of petitioner, but also prevents petitioner from obtaining employment in any other school in New Jersey which is supported in whole or in part by public funds, directly or indirectly, unless petitioner takes the oath required by the statute.

B

Jurisdiction

The date of the judgment of the Supreme Court of New Jersey sought to be reviewed is March 12, 1951 (R. 27). The jurisdiction of this Court is invoked under Section 1257 of the Judiciary Act of June 25, 1948, c. 646, 62 Stat. 929; 28 U.S.C., sec. 1257.

The Statute of New Jersey, the validity of which is involved herein, is New Jersey Laws of 1949, Chapter 23, page 70, amending Revised Statutes of New Jersey, Sections 18:13-9.1 and 18:13-9.2 to provide that every applicant for a license to teach or supervise in the public schools of the state, as a condition prerequisite to the issuance of a certificate to that end, and every professor, instructor, teacher or person employed in any teaching capacity who shall be employed by, or in, any college, university, teachers' college, or other school in New Jersey supported in whole or in part by public funds, directly or through contract or otherwise with the State Board of Education, before entering upon the discharge of his or her duties shall subscribe to the oath of allegiance and office prescribed by Revised Statutes of New Jersey, Section 41:1-3 as amended by New Jersey Laws of 1949, Chapter 22, page 68. That oath is as follows:

> "I, , do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of , according to the best of my ability.
>
> "I do further solemnly swear (or affirm) that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of this State and to the Governments established in the United

States and in this State, under the authority of the people; and will defend them against all enemies, foreign and domestic; that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the Governments so established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatever. So help me God."

The federal question was raised initially by pleading, before the New Jersey Commissioner of Education (R. 3), and he refused to rule thereon, saying that: "The determination of the constitutionality of an act of the Legislature rests with the courts" (R. 12). Upon further appeal to the New Jersey State Board of Education, that body likewise ruled that it had no authority to pass upon the constitutionality of the statute (R. 14). Petitioner then took an appeal (in lieu of certiorari) to the Appellate Division of the Superior Court of New Jersey, but before oral argument, the Supreme Court of New Jersey certified the appeal unto itself.

The only Court in New Jersey which has passed upon this case is the Supreme Court of New Jersey, and the only rulings by any Court of New Jersey in this case are those contained in the opinion of that Court.

The major portion of the briefs and oral argument before that Court dealt with the constitutionality of the statute under the United States constitution. The opinion of the Supreme Court of New Jersey discusses at length peti-

tioner's arguments that the statute is an "invasion of 'areas of freedom' which are inviolable under the Bill of Rights embodied in the First Amendment of the Federal Constitution, secured against adverse state action by the Fourteenth Amendment" (R. 19) and is "an unconstitutional interference with plaintiff's 'right or privilege to follow the profession of a teacher'" (R. 19), and "is unenforceable as in contravention of the personal liberties secured by the Fourteenth Amendment for 'vagueness and indefiniteness' and for insufficiency in the definition 'of the standard of guilt' and that the oath prescribed constitutes a bill of attainder and an *ex post facto* law" (R. 25).

The Supreme Court of New Jersey, in its opinion, overruled all of the foregoing contentions and affirmed the decision of the Commissioner of Education against petitioner.

C

The Question Presented

1. Whether Chapter 23 of the New Jersey Laws of 1949 requiring every teacher employed in any school supported in whole or in part by public funds, directly or indirectly, to take an oath that he does not believe in, advocate or advise the use of force, violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States, or in this State, and that he is not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the Governments so established, is unconstitutional as violating the rights guaranteed by the First, Fifth and Fourteenth Amendments of the United States Constitution.

D

The Reasons Relied On for the Allowance of the Writ

1. The Supreme Court of New Jersey has decided the question of constitutionality involved herein in a way probably not in accord with applicable decisions of this Court.

2. The Court below permitted the statute to set up unconstitutional obstacles to petitioner's right or privilege to follow the profession of a teacher. The statute regulates thought and thereby abridges civil liberties; the statute is a test law probing the conscience of the affiant; no attempt is made to meet the test of clear and present danger or a situation tantamount thereto.

3. The statute in question is vague and indefinite, and the standard of guilt is not sufficiently defined. No reasonably ascertainable standard of guilt is prescribed.

4. The statute permits the finding of guilt by association and the administration of punishment therefor.

5. The oath and the consequences following from the refusal to take same, constitute a bill of attainder and an *ex post facto* law.

6. To the extent that the previous decisions of this Court do not apply to any aspect of this case, the Supreme Court of New Jersey decided a federal question of substance not heretofore decided by this Court, but which in the public interest, certainly should be decided by this Court.

7. The judgment below affects precious rights guaranteed by the United States Constitution, and each violation which is permitted to pass by forms a stepping stone to other and greater violations.

Conclusion

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court, directed to the Supreme Court of New Jersey, commanding that Court to certify and send to this Court for its review and determination, upon a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 692, *George B. Thorp, Petitioner-Appellant* vs. *The Board of Trustees of Schools for Industrial Education of Newark, New Jersey, Defendant-Respondent*, and that said judgment of the Supreme Court of New Jersey may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

GEORGE B. THORP,
By SAMUEL L. ROTHBARD,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of New Jersey (R. 15) was filed March 12, 1951, and is reported in 6 N. J. 498, 79 A2d 462.

II

Jurisdiction

The date of the judgment of the Supreme Court of New Jersey sought to be reviewed is March 12, 1951 (R. 27). The jurisdiction of this Court is invoked under Section 1257 of the Judiciary Act of June 25, 1948, c. 646, 62 Stat. 929; 28 U.S.C., sec. 1257.

The Statute of New Jersey, the validity of which is involved herein, is New Jersey Laws of 1949, Chapter 23, page 70, amending Revised Statutes of New Jersey, Sections 18:13-9.1 and 18:13-9.2 (see appendix below) to provide that every applicant for a license to teach or supervise in the public schools of the state, as a condition prerequisite to the issuance of a certificate to that end, and every professor, instructor, teacher or person employed in any teaching capacity who shall be employed by, or in, any college, university, teachers' college, or other school in New Jersey supported in whole or in part by public funds, directly or through contract or otherwise with the State Board of Education, before entering upon the discharge of his or her duties shall subscribe to the oath of allegiance and office prescribed by Revised Statutes of New Jersey, Section

41:1-3 as amended by New Jersey Laws of 1949, Chapter 22, page 68. That oath is as follows:

> "I, , do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of , according to the best of my ability.
>
> "I do further solemnly swear (or affirm) that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of this State and to the Governments established in the United States and in this State, under the authority of the people; and will defend them against all enemies, foreign and domestic; that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises, or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the Governments so established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatever. So help me God."

III

Statement of the Case

Petitioner, George B. Thorp, a duly qualified teacher, specializing in the fields of mechanical and aeronautical engineering, of many years experience, entered into a contract of employment with the Board of Trustees of the School for Industrial Education, as a Special Lecturer in mechanical engineering at the Newark College of Engi-

neering (R. 3), a school supported in whole or in part by public funds (R. 6). After entering upon the duties of such employment, he was notified he would have to sign the oath of allegiance and office, hereinafter set forth, and upon his refusal to do so because of conscientious and constitutional objections, the contract of employment was breached by the college, and petitioner's employment as a teacher was terminated (R. 2, 8, 10, 17). Petitioner filed an appeal with the Commissioner of Education of the State of New Jersey (R. 3) and that official refused to restore petitioner to his teaching position and refused to rule upon the constitutionality of the statute, claiming that he had no authority to do so (R. 12). From that decision, petitioner appealed to the New Jersey State Board of Education (R. 13) and that Board likewise refused to restore petitioner to his teaching position, and likewise ruled that it had no authority to pass upon the constitutionality of the statute involved (R. 13).

Petitioner appealed (in lieu of certiorari) to the Appellate Division of the Superior Court of New Jersey (R. 2); that appeal was removed by certification to the Supreme Court of New Jersey, upon the latter's own motion (R. 1). After oral argument, the Supreme Court of New Jersey sustained the validity of the statute, overruled all the objections raised by petitioner, affirmed the decision of the New Jersey State Board of Education and refused to grant petitioner the relief he sought (R. 15). The effect of the decision is not merely to affirm the action of the college in breaching the then existing contract of employment of petitioner, but also prevents petitioner from obtaining employment in any other school in New Jersey which is supported in whole or in part by public funds, directly or indirectly, unless petitioner takes the oath required by the statute.

IV

Specification of Errors to Be Urged

1. The Supreme Court of New Jersey erred in finding and holding that Chapter 23 of the New Jersey Laws of 1949 was not unconstitutional and did not infringe the rights guaranteed petitioner by the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. The Supreme Court of New Jersey erred in affirming the decision of the New Jersey State Board of Education.

3. The Supreme Court of New Jersey erred in refusing to grant petitioner relief.

V

ARGUMENT

Chapter 23 of the New Jersey Laws of 1949 Is Unconstitutional Because in Violation of the First, Fifth and Fourteenth Amendments to the United States Constitution

The nub of the controversy with respect to this law lies in the determination of what conditions may be imposed upon the pursuit of one's chosen profession, avocation or field of gainful endeavor. Those who resist the taking of such oaths are constantly met with the argument exemplified in the famous statement of Mr. Justice Holmes in *McAuliffe* v. *Mayor*, 155 Mass. 216, "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." That the foregoing statement is a correct description of the law is beyond cavil; that it has been the starting point of many an unconstitutional enactment is also beyond cavil. For, while it may be true that no one has a constitutional right to be a policeman, it does not necessarily follow that any sort of qualification or condition precedent may be imposed for public employment. Ob-

viously, a statute which says that one cannot be employed in any school deriving its funds from the State unless the person be a member of the Caucasian Race and of the Presbyterian faith would be stricken down as invalid. It follows then that whether a person has a right to public employment or even if, in fact, the right is no more than a privilege; neither the right nor the privilege may be limited by legislative enactments which invade areas of freedom; for example, religion or racial discrimination which are constitutionally inviolate.

The test then is to determine whether or not the instant oath does not set up unconstitutional obstacles to the appellant's right or privilege to follow the profession of a teacher. Considering first the words, "I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States or in this State," we are struck at once with the difficulty of legally and constitutionally justifying the throttling of any unorthodox philosophy which must inevitably flow from such proscription.

The words of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, have become a classical expression of American freedom:

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,

> religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

And in *Thomas* v. *Collins*, 323 U. S. 516, Mr. Justice Jackson further buttressed this right by stating:

> "It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

So concerned is the law with the avoidance of any restriction on any of the civil rights guaranteed by our Constitution that the customary presumption of constitutionality does not apply to any law abridging any of the civil liberties.

Thomas v. *Collins*, supra;
Thornhill v. *Alabama*, 310 U. S. 88;
Schneider v. *State*, 308 U. S. 147;
Murdock v. *Penn*, 319 U. S. 105.

Under the circumstances, any law purportedly restricting a civil liberty is rigidly scrutinized. Thus, Mr. Justice Rutledge, speaking in *Thomas* v. *Collins*, supra, stated:

> "Choice on that border, now as always delicate is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. * * * For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process

grounds, will not suffice. These rights rest on firmer foundation."

Viewed in the light of the foregoing test, there can be no question but that the legislation here considered must fail. No one can seriously contend that a situation has arisen within the school system or, for that matter, outside of it to demonstrate the existence of a clear and present danger to the American way of life.

Indeed, the instant law lacks even the mask of a legislative finding with respect to any such danger. The Court may take judicial notice that this law was passed without any public hearing. If the answer be made that we are justified in extreme measures because of the existing cold war, let us not forget that our Federal Constitution was drafted in a period shortly after our emergence from a very hot war. At that time, there were present within our infant nation powerful interests who were not at all reconciled to our separation from Great Britain; internal jealousy between the states flowered; hostile Indian tribes and powerful foreign nations menaced us from all sides, and the continued existence of our nation was extremely questionable. Notwithstanding all of this, the founding fathers saw fit, by constitutional enactment, to make the definition and proof of treason extremely exacting. Surely, we are not less strong or stable or concerned with our essential continuance that we must demonstrate hysteria and mass neuroses in frantic limitation of our historic freedoms.

Considering the language of the first part of the additional sections of the oath, we are struck at once by the prohibition against belief. We make so bold as to say that no legislative enactment with respect to prohibition on belief alone has ever been upheld in the past.

In 1920, Governor Alfred E. Smith of New York, vetoing one section of the Lusk Laws which attempted to amend

the New York Education Law with respect to the qualification of teachers, said:

> "This bill provides that every public school teacher in the State shall obtain a certificate from the Commissioner of Education to the effect that he or she is of good moral character, and has shown satisfactorily that he or she will support the State and Federal Constitutions and is loyal 'to the institutions and laws thereof'. The certificate may be revoked without hearing on the ground that the Commissioner may find that the teacher is not 'loyal to the institutions of the United States and of the State of New York and the laws thereof.' The test established is not what the teacher teaches but what the teacher believes, and the effect of the bill would be to make the Commissioner of Education the sole and arbitrary dictator of the personnel of the teaching force of the State in its public schools.
>
> "This bill must be judged by what can be done under its provisions. It permits one man to place upon any teacher the stigma of disloyalty and this even without hearing or trial. No man is so omniscient or wise as to have entrusted to him such arbitrary and complete power not only to condemn any individual teacher but to decree what belief or opinion is opposed to what he deems to be the institutions of the country.
>
> "No teacher could continue to teach if he or she entertained any objection, however conscientious, to any existing institution. If this law had been in force prior to the abolition of slavery, opposition to that institution which was protected by the Constitution and its laws, would have been just cause for the disqualification of a teacher. There is required of the teacher not only loyalty to the Constitution and laws of the State but also loyalty to what is described as the institutions of the United States and of the State of New York.
>
> "Opposition to any presently established institution, no matter how intelligent, conscientious or disinterested, this opposition might be, would be sufficient to

disqualify the teacher. Every teacher would be at the mercy of his colleagues, his pupils and their parents, any word or act might be held by the Commissioner to indicate an attitude hostile to some of 'the institutions of the United States' or of the State.

"The bill unjustly discriminates against teachers as a class. It deprives teachers of their right to freedom of thought, it limits the teaching staff of the public schools to those only who lack the courage or the mind to exercise their legal right to just criticism of existing institutions. The bill confers upon the Commissioner of Education a power of interference which strikes at the foundations of Democratic education."

As to the words "advocate and advise," how can we say what they mean? Does a person advocate the happening of a certain occurrence if the person sincerely and solemnly believes in the inevitability of that occurrence? Thus, if one believes that ultimately all of the public utilities of this country will be nationalized as a result of a free choice and peaceful ballot, does the expression of that belief amount to advocacy or advice? Is it not a fact that many of the great religions which have taught the essential evil of man unless saved by a merciful God were not advocating evil in man, but rather good? If a teacher in one of the social science courses in our school system should say that the people of Europe will adopt a Socialist form of government and makes that statement as a result of a careful and objective analysis of current European conditions, does that mean that that teacher had advocated the adoption of such form of government? Now, suppose that teacher should say that the people of the Central American Republics traditionally overthrew their government by the use of force and violence, does that indicate advocacy or belief? Suppose further that

the same teacher should then predict the overthrow of not only the Central American Republics, but of the United States Government by force and violence as a result of his study of history. Does that make him an advocate or adviser of such tactics?

Governor Thomas Dewey, who is as staunch a Republican as Governor Smith was a Democrat, demonstrated that, in the field of civil liberties, there is no partisan view, when, in his great debates with Governor Stassen during the 1948 campaign in Oregon, he said, with respect to similar Federal legislation:

> "I am unalterably, wholeheartedly and unswervingly against any scheme to write laws outlawing people because of their religious, political, social or economic views.
>
> "I am against it because it is a violation of the Constitution of the United States and of the Bill of Rights. I am against it because it is immoral and nothing but totalitarianism itself."

Any attempt to stamp out the legal validity of the widest possible diversity of opinion and privilege can only result in ultimate straitjacketing of the American mind. The history of our country is a history of persons fleeing from dictated orthodoxy in various fields of intellectual and moral endeavor. There is hardly a religious denomination in existence in this country which, at one time or another, was not persecuted abroad. Anyone who has ever examined the writings of our founding fathers must be struck with the extreme divergence of the philosophies current prior to and during the American Revolution. It is no accident that those who are addicted to the most radical political thought can buttress their beliefs with large tracts of applicable references from the writings of Jefferson, Madison and Paine. This nation has not only

been a melting pot of races, but it has been a melting pot of political beliefs, and hardly any political theory, however fantastic it may have seemed to the majority of the people, has not been experimented with in this country at one time or another. If this country has escaped the explosive changes so current in almost every hemisphere of the world, is it not because there has never been an attempt to throttle the free expression of dissenting views? History is replete with examples of the victors accepting the philosophies and habits of the vanquished; what will we have gained if we win a war and lose our freedom?

It must not be forgotten that, in the instant case, one taking the oath subjects himself to a trial for perjury. In *Herndon* v. *Lowry*, 301 U. S. 242, the Court stated:

> "The statute so construed and applied amounts only to a drag net which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

See also *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81.

New Jersey statutes have been invalidated for vagueness and indefiniteness and because the standard of guilt was not sufficiently defined. *State* v. *Klapprott*, 127 N.J.L. 395; *Lanzetta* v. *New Jersey*, 306 U.S. 451.

While it is clear that legislation making illegal the use of certain words which has been found by the Legislature to constitute a clear and present danger, has been upheld, *Whitney* v. *California*, 274 U.S. 357; *Gitlow* v. *New York*, 268 U.S. 652, we are not confronted with such legislation here. Moreover, the rule of the *Whitney* case and the

Gitlow case, in view of the dissenting opinions therein, and in view of the later action of the United States Supreme Court in *Taylor* v. *Mississippi*, 319 U.S. 583, striking down a state law which punished words "designed and calculated to encourage violence" on the ground that there was no clear and present danger shown are hardly compelling authorities. As an example of the indefiniteness of this type of language, consider the admonition of Mr. Justice Jackson when he was Attorney General of the United States with respect to the uncertainty of the term "subversive":

> "Activities which seem helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence may be regarded as 'subversive' by those whose property interests might be affected thereby. Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration. Some of our soundest constitutional doctrines were once punished as 'subversive'. (Speech to conference of the United States Attorneys, April 1, 1940)."

Turning to a consideration of the second part of the oath, to wit: "that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the governments so established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatever", we are again confronted with the vague and indefinite character of the words used. What does it mean to be "affiliated" with an organization? Every one of us belongs to many organizations which join on various levels with other organizations for many purposes. Do we, therefore, become an affiliate of these other organizations?

How is a "member or affiliated with a group of persons" to be construed? If other members of my family, living in a common household and with whom I share my meals and living expenses, volubly and on every occasion express their determination to overthrow the Government, am I guilty of a violation of this statute? Lest this example seem far fetched, let us not forget that, under security regulations promulgated pursuant to the President's Loyalty Order, persons have been dismissed from service in the Federal Government because of their relationship and close proximity to other persons, including family relationship, whose loyalty was questioned by the Government.

Since there is no really definable standard by which the association can be definitively fixed, are we not all possible violators of the statute, in that the United States of America is affiliated with, in association with, combined with, grouped with the Soviet Union in the United Nations, and, presumably, the statute is directed against those sympathetic to the Soviet Union in its current conflict with the United States.

The Supreme Court has stricken down various attempts at finding guilt by association. In *Bridges* v. *Wixon*, 326 U.S. 136, the Supreme Court held that mere cooperation in a common cause does not create affiliation. In *Schneiderman* v. *United States*, 320 U.S. 118, the Supreme Court declared that a membership in an organization does not necessarily bring with it adherence to all the principles of the organization. In *DeJonge* v. *Oregon*, 299 U.S. 353, the Supreme Court held that participation in a meeting called by an organization did not necessarily imply acceptance of the principles of the organization.

No one has more succinctly stated the reason for the rejection of the doctrine of guilt by association in Anglo-American jurisprudence than Lord Macaulay almost a century and a half ago in his famous essay on Hallam's

"Constitutional History" when he stated, in describing the persecution of Catholics in England in the Sixteenth Century:

> "To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrine with him, that he will commit a crime, is persecution, and is, in every case, foolish and wicked * * * (We should not have) accused her government of persecution for passing any law, however, severe, against overt acts of sedition. But to argue that, because a man is a Catholic, he must think it right to murder a heretical sovereign, and that because he thinks it right he will attempt to do it, and then, to found on this conclusion a law for punishing him as if he had done it, is plain persecution * * *. If, indeed, all men reasoned in the same manner on the same data, and always did what they thought it their duty to do, this mode of dispensing justice might be extremely judicious. But as people who agree about premises often disagree about conclusions, and as no man in the world acts up to his own standard of right, there are two enormous gaps in the logic by which alone penalties for opinions can be defended * * *. Man, in short, is so inconsistent a creature that it is impossible to reason from his belief to his conduct, or from one part of his belief to another."

In *American Communications Association* v. *Douds*, 339 U.S. 382, this Court upheld a requirement that officials of Unions sign non-Communist Affidavits before the Union would be enabled to use the facilities of the National Labor Relations Board. However, the language of that case clearly demonstrates the invalidity of the statute in the instant case.

In the first instance, Chief Justice Vinson carefully pointed out that the affidavit requirement did not constitute a licensing provision prohibiting those persons who do not sign the affidavit from holding union office. In the instant case, the statute involved is a licensing provision and no person who refuses to sign the oath may teach in the public schools of the state or any school of the state deriving any of its funds from the state. The argument that was, therefore, used by the majority in the *Douds* case, to wit: that where the invasion of a civil liberty guaranteed by the Constitution is relatively small, and the evil to be apprehended by the restriction great, that the requirements of the clear and present danger rule are, therefore, satisfied. In this case, the invasion is complete in that it is not only a proscription on a civil right but it is a prohibition on a legal activity, to wit: the right of teaching. Directly connected with this argument, but perhaps of even greater weight is the fact that there is nothing before this Court, as, indeed, there was nothing before the New Jersey Supreme Court (which was the only Court that heard argument in the case) to demonstrate that there is any danger sought to be avoided by the restrictive legislation. In the *Douds* case, supra, this Court made numerous references to the congressional findings which justified the passage of the legislation. For example:

> "In essence the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by Section 9(h) impose continuing threats to that public interest when in positions of union leadership. * * * In *Bridges* v. *California*, (U.S. supra), we said that restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need

> come to this court encased in the armor wrought by prior legislative determination. • • • The 'discouragements' of Section 9(h) proceed not against the groups or beliefs identified therein but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country. Congress has concluded that substantial harm in the form of direct positive action may be expected from that combination."

There is nothing in the record to demonstrate that there has ever been any legislative finding or determination that a problem exists within the public schools of the State of New Jersey to demonstrate the need for restrictive legislation of that kind. The record below discloses that the statute was passed without any legislative hearing at all, and, for all that appears before this Court, as indeed for all that appeared before the New Jersey Supreme Court, there is not a single Communist engaged in teaching within the State of New Jersey. Perhaps even more strongly it can be stated that there is not a single manifestation in the school curriculum or in the influence on the school children to demonstrate that there are Communists engaged in the teaching profession in the State of New Jersey. That Courts may take judicial notice of many questions is, of course, true; but the doctrine of judicial notice would, indeed, have to be stretched to the point at which a Court would have to serve as a legislative fact-finding committee before it could uphold this type of restriction.

Finally, the oath must be stricken down because it constitutes a bill of attainder and an *ex post facto* law in violation of our Constitution. *Cummings* v. *Missouri*, 4 Wall. 277 (involving the necessity of subscription to an oath by teachers alleging no adherence to the enemies of the United States and those engaged in the Civil War); *United States* v. *Lovett*, 328 U.S. 303 (involving an attempt to bar so-called "subversives" from public office).

Judge Bigelow, in *Imbrie* v. *Marsh*, 5 N.J. Super. 239, 68 A2d 761, [affirmed 3 N.J. 578, 71 A2d 352], speaking for the New Jersey Superior Court, Appellate Division, and considering similar arguments, directed to the same oath with respect to elected officials, stated:

> "Counsel have argued with earnestness and ability that the statutes also violate fundamental rights of freedom and thought and political belief and that the use of some words and expressions, the meaning of which is uncertain, is a fatal defect. With much of this argument we incline to agree calling attention to * * * (citing many cases).
>
> "Many other cases might be cited. Their very number is evidence of the continual struggle that must be made to uphold our American liberties."

In connection with the foregoing statement by Judge Bigelow, let us consider the situation which should prevail if the law should be deemed valid. In the field of literature, philosophy, the social sciences, and even in the physical and biological sciences, what with atomic energy and biological warfare, how would class rooms function? Could a teacher efficiently and objectively describe all of the existing data in these fields which should be considered before an evaluation could sensibly be made? If every time a teacher undertakes to describe divergent systems and philosophies of government in economics and nuclear-physics and the attitude of Soviet biologists toward the Mendelian law of genetics, he must be careful to preface his remarks with a proclamation of his own orthodoxy or disbelief in the unpopular, will we not inevitably establish a nation of robots and storm troopers? Can anyone so straitjacketed really attempt to acquaint his students with the spirit of a Shelley or a Marlowe or a Shakespeare or a Milton; can anyone so frightened really describe the achievements of a Galileo, a Newton or an Einstein?

In fact, can anyone begin to explain the establishment of the entire American economy and thinking and standard of living without demonstrating that it is only the new in spirit and thought and belief which eventually establishes progress? To uphold this law is to accept the philosophy of Goebbels whose insane thinking at the time of the book burning episode was so vividly described by Stephen Vincent Benet:

> "Nazi Voice: When I give the command you will rise and bring your text books to my desk. All this nonsense of freedom and tolerance—that is finished. All this nonsense of men being equal—that is finished. We shall give you new text books. The old ones will be burned in the school yard. Are there any questions?
> "Benet: They burned the books 12-13 (1942)."

Happily, the New Jersey State Board of Education has recently rejected this thinking. New York Herald Tribune, December 4, 1949, Section 1, page 66, Column 1:

> "The New Jersey State Board of Education yesterday urged public school teachers to discuss 'controversial questions' in their class rooms. The board, however, warned teachers to present both sides of all controversial issues and to avoid going into such subjects beyond their own depth."

We suggest that the Board, in the foregoing directive, has indicated the impossibility of conducting a system of education where every teacher finds himself with an intellectual straitjacket, such as is created by Chapter 23 of the Laws of 1949.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end, a writ of certiorari should

be granted, and this Court should review the decision of the Supreme Court of New Jersey and finally reverse it.

Respectfully submitted,

SAMUEL L. ROTHBARD,
Counsel for Petitioner.

Emil Oxfeld, of the New Jersey Bar, on the Brief.

APPENDIX

New Jersey Laws of 1949, Chapter 23, page 70.

An act concerning education, and amending sections 18:13-9.1 and 18:13-9.2 of the Revised Statutes.

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

1. Section 18:13-9.1 of the Revised Statutes is amended to read as follows:

18:13-9.1. Every person, whose application is pending, or who hereafter applies for a license, or any renewal thereof, to teach or supervise in any of the public schools of this State shall subscribe to the oath of allegiance and office prescribed in section 41:1-3 of the Revised Statutes.

Such oath or affirmation shall be executed in duplicate and one copy thereof shall be filed with the county superintendent and by him transmitted to the commissioner and the other copy thereof shall be retained by the person subscribing to such oath or affirmation to be by him or her delivered to the board or body, person or persons, employing him or her within this State.

No certificate shall be issued unless such oath or affirmation shall have been filed.

The oath may be subscribed before any officer authorized by law to administer oaths and any county superintendent, president, secretary or district clerk of a board of education of this State may administer the oath referred to in this section and sections 18:13-9.2 and in 18:13-9.3 of this Title.

2. Section 18:13-9.2 of the Revised Statutes is amended to read as follows:

18:13-9.2. Every professor, instructor, teacher or person employed in any teaching capacity who shall be employed hereafter by, or in, any college, university, teachers college, or other school in this State which is supported in whole or in part by public funds, directly or through contract or otherwise with the State Board of Education

shall, before entering upon the discharge of his or her duties, subscribe to the oath of allegiance and office prescribed in section 41:1-3 of the Revised Statutes, before an officer authorized by law to administer oaths. A copy of such oath shall be filed with the board or body, person or persons employing him or her within this State.

3. This act shall take effect immediately.

Approved April 12, 1949.

New Jersey Laws of 1949, Chapter 22, page 68.

An act concerning the oath of allegiance and office and providing for the taking of the same as a prerequisite to the assumption of public office, position or employment in this State, and amending section 41:1-3 of the Revised Statutes.

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

1. Section 41:1-3 of the Revised Statutes is amended to read as follows:

41:1-3. In addition to any official oath that may be specially prescribed, the Governor for the time being and every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, or to any office of the militia, of, or in, this State or of, or in, any department, board, commission, agency or instrumentality of this State, or of, or in, any county, municipality or special district other than a municipality therein, or of, or in, any department, board, commission, agency or instrumentality thereof, and every counsellor and attorney-at-law, shall, before he enters upon the execution of his said office, position, employment or duty take and subscribe the oath of allegiance and office as follows:

"I, ..., do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the

duties of ....., according to the best of my ability.

"I do further solemnly swear (or affirm) that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of this State and to the Governments established in the United States and in this State, under the authority of the people; and will defend them against all enemies, foreign and domestic; that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the Governments so established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatever. So help me God."

2. This act shall take effect immediately.

Aproved April 12, 1949.